December 3, 2001

Ken Toole
P.O. Box 1462
Helena, Montana 59624

Dear Mr. Toole:

On November 20, 2001, the Legislative Services Division received the text of your proposed initiative petition to create a Montana Public Power Commission and directing the Commission to conduct a due diligence analysis and acquire hydroelectric generation facilities in Montana by purchase or condemnation. The text of your initiative was reviewed pursuant to section 13-27-202, MCA, for clarity, consistency, and other factors normally considered when drafting proposed legislation. This letter constitutes the Legislative Services Division staff's recommendations concerning your proposal.

Only the text of the initiative is reviewed by this office. The title of the measure and the statements of implications ("FOR" and "AGAINST" language) are written by the Attorney General pursuant to section 13-27-312, MCA. The form of the petition is approved by the Secretary of State and the Attorney General pursuant to section 13-27-202(3), MCA.

STYLE ISSUES

Section 13-27-201(2), MCA, requires that the text of an initiative measure must be in the bill form provided in the most recent issue of the Bill Drafting Manual furnished by the Legislative Services Division. I note that very little effort has been made to conform the text to the style provisions contained in the 2000 Bill Drafting Manual. There is no specific statement in the 2000 Bill Drafting Manual requiring the text of legislation to be written in complete sentences. I apologize for that oversight and will remedy the omission in future editions of the Bill Drafting Manual. Because the "minor" style suggestions are so numerous, I will not enumerate each specific suggestion, but will merely incorporate the minor suggestions in the attached revised version of your proposal. In addition to the numerous "minor" style suggestions, I have additional suggestions and comments concerning style.

I note that the property to be acquired by the Montana Public Power Commission and financed through revenue bonds is referenced differently throughout the proposed measure. For example, equipment, contract rights, distribution and transmission facilities, and dams are included in some lists but not in others. I also note that references to property are treated differently. Unless the disparate treatment is intentional, I would suggest that all enumerations be consistent. An easy way to achieve consistency would be to include a definition of the term "hydroelectric generation facility" and then to use the defined term consistently throughout the measure.

I also note that the use of the proceeds of the revenue bonds by the Montana Public Power Commission is different than the purpose for which the Board of Examiners is authorized to issue the bonds. It appears essential that the purposes for which the bonds may be issued are

made consistent with the purposes for which the proceeds may be used. The inclusion of alternative renewable energy sources and energy conservation projects as items that may be acquired with bond proceeds in section 4(1)(d) of the proposed initiative is not consistent with the purpose stated in section 2 of the proposed initiative. Likewise, although section 2 of the proposed initiative clearly states that the purpose of the proposed initiative is to operate acquired hydroelectric generation facilities, that authority is not specifically reflected in the powers and duties of the Commission as enumerated in section 4 of the proposed initiative.

I recommend that the portions of section 4 of the proposed initiative delineating the powers and duties of the Board of Examiners be placed in a separate section to clearly distinguish the Board's powers and duties from those granted to the Montana Public Power Commission.

The text of the proposed initiative does not contain a codification instruction. A codification instruction is not required but can be used to incorporate certain provisions of present law into a bill. A codification instruction can also be used to limit the discretion of the Code Commissioner as to which provisions of the initiative to codify as "comprising laws of a general and permanent nature" as provided in section 1-11-204(3)(a), MCA. See page 57 of the Bill Drafting Manual for a discussion of codification instructions.

An effective date section is not included in the proposed initiative. Section 13-27-105(1), MCA, provides that unless the measure contains an effective date, a statutory initiative is effective on October 1 following approval. Without a specific effective date, if the proposed initiative were approved by the voters, the measure would become effective October 1, 2003. The 58th Legislature would be adjourned before the initiative became effective. There would be no effective statutory direction to the 2003 Legislature to implement the initiative until the Legislature convened in January 2005. Because of the necessity of implementing the Montana Public Power Commission in section 3 of the proposed initiative with additional legislation, such as establishing districts, providing for the election of members, and establishing terms of office, actual implementation of the Commission could be delayed until the election in November 2006.

SUBSTANTIVE ISSUES

For the purpose of analyzing the substance of the proposed initiative, the rules applicable to the interpretation of initiatives are the same as those applying to legislation enacted by the Legislature. See *State Bar of Montana v. Krivec*, 193 Mont. 477, 632 P.2d 707 (1981), and *State ex rel. Palmer v. Hart*, 201 Mont. 526, 655 P.2d 965 (1982). My review of the proposed initiative raises several substantive issues that I will address sequentially.

Advisory Measure -- Special Legislation

Article III, section 4(1), of the Montana Constitution provides that the people may enact laws by initiative on all matters except appropriations of money and local or special laws. The substance of the proposed initiative directs the newly created Montana Public Power Commission to conduct an assessment of existing hydroelectric generation facilities and to determine those that are in the public interest to acquire. The Montana Public Power Commission is then required to

either purchase the facilities or condemn the facilities. The Montana Public Power Commission is also required to sell electrical energy to customers with a specified priority and to reimburse taxing units for lost revenue associated with the acquisition of the hydroelectric generation facilities. However, section 3 of the proposed initiative, establishing the Montana Public Power Commission, cannot be implemented until the Legislature enacts additional legislation as discussed in the effective date discussion of the style issues analysis. If the proposed initiative is approved by the voters, nothing could be done to implement the purpose of the initiative, as stated in section 2, unless the Legislature acted to adopt additional laws to implement the Montana Public Power Commission. In *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (1984), the Montana Supreme Court reviewed a proposed constitutional initiative that, if adopted by the voters, would have amended the Montana Constitution to direct the 1985 Legislature to adopt a resolution requesting Congress to call a constitutional convention for the sole purpose of adopting a balanced budget amendment. It also would have required that if the resolution was not adopted within 90 legislative days, the Legislature would remain in session without pay until the resolution was adopted. The Supreme Court, in granting injunctive relief, held that although the initiative was a constitutional amendment in form, it was in substance a legislative resolution. The Court held that the initiative power conferred by the Montana Constitution does not include the power to enact a legislative resolution. The electorate cannot circumvent the Montana Constitution by indirectly doing that which can be done directly.

It is arguable that because the proposed initiative cannot be implemented unless the Legislature acts, the proposed initiative is in essence a resolution or statement of sentiment from the people to the Legislature. A resolution or statement of sentiment is not a "law" within the meaning of Article III, section 4(1), of the Montana Constitution and is therefore not the proper subject of an initiative. In light of this concern, you may wish to make the initiative self-executing.

As pointed out earlier, Article III, section 4(1), of the Montana Constitution prohibits the enactment of special legislation by initiative. That is a more stringent restriction than is contained in Article V, section 12, of the Montana Constitution applying to the Legislature. A special statute within the meaning of the Montana Constitution is one that relates to particular persons or things of a class, one that is made for individual cases and for less than a class, or one that relates and applies to particular members of a class either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for the limitation, be applicable. *State ex rel. Powell v. State Bank of Moore*, 90 Mont. 539, 4 P.2d 717 (1931). A law that operates in the same manner upon all persons in like circumstances is not "special" in the constitutional sense. *Linder v. Smith*, 193 Mont. 20, 629 P.2d 1187 (1981). A statute that is general and operates uniformly and equally on all persons in Montana is a general law, not local or special legislation in the constitutional sense. *Palmer v. State*, 191 Mont. 534, 625 P.2d 550 (1981). The most directly analogous case to the proposed initiative is *Grossman v. State*, 209 Mont. 427, 682 P.2d 1319 (1984).

In *Grossman*, an action was brought seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. The challengers contended that the appropriation of funds for favorable loans to a score of small municipalities,

water districts, and portions of counties constituted special legislation and was unconstitutional. The Montana Supreme Court noted that Article V, section 12, of the Montana Constitution is not absolutely prohibitory, although Article III, section 4(1), of the Montana Constitution is absolutely prohibitory. The Court noted that the Legislature cannot draft a general act of statewide application providing for the issuance and sale of revenue bonds and at the same time keep a handle on the way the proceeds are to be spent or loaned except through its direct authorization of projects. The Court held that the passage of Chapter 705, Laws 1983, was an implementation of Title 85, chapter 1, part 6, MCA, and did not exclude any class of governmental entity. Therefore, those enactments were "general" legislation within the meaning of Article V, section 12, of the Montana Constitution. The Court also held that sections 5 and 6 of Chapter 705, Laws of 1983, were valid in any event because even though local in effect or "special", these were provisions for which a general act could not be provided.

The proposed initiative apparently applies only to hydroelectric generation facilities, although section 4(1)(d) of the proposed initiative indicates otherwise. The priority for sales of electrical energy from state-acquired facilities to certain customers may constitute prohibited special legislation. In addition, if the acquired hydroelectric generation facilities are operated by the state, the provisions of section 5 concerning the rights of employees of facilities may constitute special legislation. It would appear that the rights of state employees employed at hydroelectric generation facilities are likely to be different from those of all other state employees. You may wish to peruse the provisions of section 57, Chapter 585, Laws of 2001, concerning the transfer of certain county employees to state employee status.

Delegation of Authority

Section 4 of the proposed initiative directs the Montana Public Power Commission to conduct an assessment of existing hydroelectric generation facilities and determine those "which are in the public interest for the state of Montana to acquire". There are no standards contained in the proposed initiative that the Commission is to apply in determining public interest. When the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power given to the agency. *Douglas v. Judge*, 174 Mont. 32, 568 P.2d 530 (1977). See also *In re Gate City Savings & Loan Association*, 182 Mont. 361, 597 P.2d 84 (1979). *Grossman* also contains an excellent discussion of adequate standards or limits on the discretion of an Executive Branch agency. In *Grossman*, the Montana Supreme Court found that sections 85-1-501 and 85-1-502, MCA, imposed standards with reasonable clarity.

In addition, section 4(3) of the proposed initiative provides that the Montana Public Power Commission and the Board of Examiners have all powers necessary and convenient to carry out the duties in subsections (1) and (2). When it is possible for the law to specify the powers and duties, it should do so in order to avoid the delegation of authority issue. Constitutional law does not allow for an administrative board to legislate the limits of its own power, which in this case it would be required to do in order to give some meaning to the terms of the proposed initiative. See *White v. State*, 233 Mont. 81, 759 P.2d 971 (1988). You may wish to look to the provisions of sections 25 through 28 of Chapter 577, Laws of 2001, enacted by House Bill No. 474, and

codified as sections 69-9-111 through 69-9-114, MCA, for an example of the specific authority needed to issue revenue bonds.

Condemnation Authority -- Impairment of Contract-- Commerce Clause

Section 4(1)(b) of the proposed initiative authorizes the Montana Public Power Commission to use the power of eminent domain, if necessary, to acquire hydroelectric generation facilities, dams, real or personal property rights, equipment, contract rights, and associated water rights in a manner consistent with the provisions of Title 85, chapter 1, part 2, MCA. Section 85-1-209, MCA, authorizes the Department of Natural Resources and Conservation to acquire by condemnation, in accordance with Title 70, chapter 30, MCA, any land, rights, water rights, easements, franchises, and other property considered necessary for the operation and maintenance of state waterworks. Title 70, chapter 30, MCA, contains the general laws governing the exercise of the power of eminent domain. Section 70-30-102, MCA, enumerates the public uses for which the power of eminent domain may be exercised. Included in the list of public uses are property and water rights necessary for waterworks as provided in sections 85-1-209 and 85-7-1904, MCA, and electrical energy lines. Section 70-30-103, MCA, enumerates the property that may be taken in an eminent domain proceeding, and section 70-30-104, MCA, enumerates the estates and rights in land that may be taken for a public use. As part of the general revision of eminent domain laws enacted by Chapter 125, Laws of 2001, the Legislature amended section 70-30-102, MCA, to include a comprehensive list of all statutorily enumerated public uses. If the authority contained in section 4 of the proposed initiative is broader than the authority contained in sections 85-1-209 and 85-7-1904, MCA, then you should amend section 70-30-102, MCA, to conform to the establishment of the comprehensive list established by Chapter 125, Laws of 2001.

The ability to condemn water rights has long been recognized in Montana. See *Prentice v. McKay*, 38 Mont. 114, 98 P. 1081 (1909), and *Carlson v. City of Helena*, 39 Mont. 82, 102 P. 39 (1909). The police power of the state, which enables the state to pass laws for the health, safety, and general welfare of the people, must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. See *In the Matter of the Adjudication of the Existing Water Rights of the Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992), citing *Yellowstone Valley Electric Cooperative v. Ostermiller*, 187 Mont. 8, 608 P.2d 491 (1980). However, section 70-30-103(1)(c), MCA, provides that property that is already appropriated to a public use may not be taken unless for a more necessary public use than that to which the property has already been appropriated. Under this standard, it may be difficult for the state to show a "more necessary" public use. In *City of Missoula v. Mountain Water Company*, 228 Mont. 404, 743 P.2d 590 (1987), the City attempted to take a water supply and a privately owned water system by eminent domain. The City passed an ordinance and a resolution authorizing the taking of the water supply and water system. The City contended that the necessity for the taking was conclusively presumed based upon the ordinance and resolution. The District Court disagreed, and the Supreme Court upheld the District Court. The Supreme Court reaffirmed that "necessary" as used in section 70-30-111, MCA, means a reasonable, requisite, and proper means to accomplish the improvement. The Supreme Court discussed the wide range of considerations that can be used in determining whether a proposed

public use is more necessary than the present use. The District Court made detailed findings listing the reasons for concluding that the City did not prove that it was necessary to acquire the water system. The findings included the effect on Mountain Water employees, the effect on public savings on rates and charges, the effect on cooperation between the City and the company, and the effect of having the company's home office in Missoula. The Supreme Court found that the District Court had erred in excluding evidence concerning profit, the out-of-state ownership of Mountain Water, and the votes of the people and the City Council. The Supreme Court determined that the evidence concerning private versus public ownership was pertinent to determining whether the public interest required the taking under section 70-30-111, MCA, as broadly drafted and defined. The Supreme Court held that because section 70-30-111, MCA, gives the District Court the power to determine whether a taking is necessary, the votes by the people and the City Council could not be finally dispositive of the issue of necessity. The Supreme Court determined that the votes had to be considered and weighed with other factors in determining the necessity of the taking. The Supreme Court expressed regret that section 70-30-111, MCA, does not set forth all of the issues that are appropriate for consideration on the necessity for a taking or the weight to be given to the various factors. The Supreme Court did point out that the City has the burden of proving that the taking was necessary by a preponderance of the evidence. On remand, the District Court again concluded that the City had failed to prove the necessity for the taking. In a second appeal, in *City of Missoula v. Mountain Water Company*, 236 Mont. 442, 771 P.2d 103 (1989), the Supreme Court upheld the District Court's determination. In that case, many additional offers of evidence by the City were precluded by the law of the case.

Generally, the power of a state to take private property is as broad as the state's police power. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Authority from other jurisdictions authorizes the condemnation of a private utility by a public entity. In *Emerald People's Utility District v. Pacific Power & Light Company*, 729 P.2d 552 (Ore. 1986), a public utility district was authorized to condemn a private utility. The Oregon Constitution authorizes the creation of public utility districts and authorizes the districts to condemn property. In *Emerald,* an Oregon statute also authorized the state or a municipality to take over power generation facilities at a "net investment" cost. See also *Puget Sound Power & Light Company v. Public Utility District No. 1 of Whatcom County*, 123 F.2d 286 (9th Cir. 1941). The condemnation of a private utility by a town was approved in *Town of Massena v. Niagara Mohawk Power Corporation*, 382 N.E.2d 1139 (C.A. N.Y. 1978). In *State ex rel. Washington Water Power Company v. Superior Court for Chelan County*, 208 P.2d 849 (Wash. 1949), a Washington public utility district was authorized to take the Chelan hydroelectric generating plant, transmission lines, and certain licenses issued by the Federal Power Commission issued in 1926 and set to expire in 1976. The Washington Supreme Court noted that 16 U.S.C. 807, specifically reserves to states and municipalities the authority to take over, maintain, and operate any project licensed under Title 16, chapter 12, U.S.C., through a condemnation action.

I am unaware of any Montana case in which contract rights have been specifically condemned. However, while the majority decision in *City of Missoula I* appears to lead to the conclusion that by condemning a privately owned water supply in favor of a publicly owned water supply, the contracts of the privately owned company could be impaired, the Court did not specifically

address that issue. On the surface, the condemnation of contract rights would appear to be a direct violation of Article II, section 31, of the Montana Constitution and Article I, section 10, of the United States Constitution prohibiting the impairment of contracts. However, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the United States Supreme Court held that *Congress* has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. In Montana, the Montana Supreme Court has adopted a three-part test to determine whether legislation has violated the impairment of contracts clause of the Montana Constitution: (1) does state law, in fact, operate as a substantial impairment of the contractual relationship; (2) if the legislation substantially impairs the contractual rights, the state, in justification must have a significant and legitimate public purpose behind the regulation; and (3) the adjustment of rights and responsibilities of the contracting parties must be based upon reasonable conditions and be of a character appropriate to the public purpose justifying the legislation. See *Western Energy Company v. Genie Land Company*, 227 Mont. 74, 737 P.2d 478 (1987). While I am not aware of a decision specifically determining a *state's* authority to affect contractual commitments through economic legislation, *Hawaii* and *Puget Sound* appear to authorize the taking of a private utility, which would of necessity take the private utility's contracts either directly or indirectly. That conclusion is also consistent with the application of 16 U.S.C. 807 specifically authorizing states to take federally licensed generation facilities.

The ability to acquire an electrical energy contract through eminent domain also has implications as being an attempt to regulate interstate commerce in violation of Article I, section 8, clause 3, of the United States Constitution. For example, in *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153 (1986), the City's attempt to acquire a National Football League franchise by eminent domain was declared invalid under the commerce clause. The *Oakland* court noted that the use of eminent domain has traditionally concerned real property and therefore rarely implicates commerce clause considerations. However, in *Elberton Southern Railway Company v. State Highway Department*, 89 S.E.2d 645 (Ga. 1955), it was held that the power of eminent domain may be exercised even though interstate commerce may be directly or incidentally involved. Because Congress has specifically authorized states to take federally licensed generation facilities, the taking of licensed hydroelectric generation facilities should be able to withstand a commerce clause challenge.

Revenue Bonds -- Appropriation

In *Fickes v. Missoula County*, 155 Mont. 258, 470 P.2d 287 (1970), the Montana Supreme Court had the opportunity to discuss revenue bonds. In *Fickes* the Court gave several examples of revenue bond issues where the Court had universally held that revenue bonds did not create a debt or liability within the meaning of Article XIII, section 5, of the 1889 Montana Constitution. Article VIII, section 8, of the 1972 Montana Constitution contains the current constitutional restrictions on state debt, and Article VIII, section 10, of the 1972 Montana Constitution requires the Legislature to establish debt limits for local government. The Court noted that the common quality of each project was that there is an explicit provision that the public body issuing the bonds does not obligate its taxing power to pay for them. Inherent in the concept of revenue bonds is the presumption that the facility financed will generate sufficient revenue to pay the

principal and interest on the bonds issued for that facility. Section 4(1)(d) of the proposed initiative authorizes the Montana Public Power Commission to use the proceeds of revenue bonds to invest in energy conservation projects as defined in 90-4-102, MCA. While reducing the waste or consumption of energy is a laudable purpose, I do not see how an energy conservation project will generate revenue to pay the principal and interest on bonds issued for that purpose. In addition, as I noted earlier, the provisions of section 4(2) of the proposed initiative do not authorize the Board of Examiners to issue bonds for either energy conservation projects or alternative renewable energy sources even though section 4(1)(d) authorizes the use of bond proceeds for those purposes.

As indicated in the discussion on advisory measures and special legislation, Article III, section 4(1), of the Montana Constitution provides that the people may not enact laws by initiative on matters involving appropriations. Section 17-7-502(4), MCA, provides that there is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. I do not believe that a law authorizing the issuance of bonds violates Article III, section 4(1), of the Montana Constitution. It is my opinion that the statutory appropriation is triggered after the bonds are issued and payments become due pursuant to the terms of the bonds. My opinion is premised upon Article VIII, section 8, of the Montana Constitution specifically authorizing state debt to be created by a majority of the electors voting on that issue. If voters can approve the issuance of general obligation bonds for which the full faith, credit, and taxing power of the state is pledged, then it follows that the voters should be able to approve the issuance of revenue bonds. Because the Constitution specifically allows voters to approve debt and prohibits voters from appropriating funds, it necessarily follows that the approval of the issuance of bonds does not constitute an appropriation of funds. I raise this issue because of the controversy concerning appropriations in the initiated referendum on House Bill No. 474.

Statutory Conflict or Duplication

As pointed out on page 4 of the 2000 Bill Drafting Manual, the importance of reviewing existing statutes in the area of law to which the bill draft relates cannot be overemphasized. This step is necessary to avoid conflict, overlap, or redundancy in state law. As you are no doubt aware, the 2001 Legislature passed House Bill No. 474, which was enacted as Chapter 577, Laws of 2001. Among other things, House Bill No. 474 created the Montana Power Authority. Section 69-9-108(1)(b), MCA, provides that the Montana Power Authority may purchase and operate electrical generation facilities. Section 69-9-108(1)(d)(ii), MCA, authorizes the Montana Power Authority to use the proceeds of revenue bonds for that same purpose. Section 69-9-111, MCA, specifically authorizes the Board of Examiners to issue $500 million of revenue bonds for the purposes authorized in section 69-9-112, MCA. Section 69-9-112, MCA, authorizes the revenue bond proceeds to be used to purchase electrical generation facilities and associated water rights for those facilities. That is the exact authority delegated to the Montana Public Power Commission in section 4(1)(a) of the proposed initiative. It does not appear to be good public policy to have two state entities attempting to purchase the exact same property for the exact same purpose. It also appears unwise to authorize $1 billion of revenue bonds when $500 million appears to be sufficient. While I am aware that an initiated referendum on House Bill

No. 474 has qualified for the ballot in November 2002, I am unwilling to speculate on the outcome of that election. I recommend that your proposed initiative either amend or repeal sections 69-9-101 through 69-9-103, 69-9-107, 69-9-108, and 69-9-111 through 69-9-115, MCA. The amendment or repeal should contain a contingency based upon the retention or rejection of House Bill No. 474.

Placement of Commission

Article VI, section 7, of the Montana Constitution requires all administrative offices, boards, bureaus, commissions, agencies, and instrumentalities of the Executive Branch, except for the offices of statewide elected officials, to be allocated to not more than 20 principal departments. Section 2-15-104, MCA, lists the Executive Branch agencies of state government. Unless you intend to have the Montana Public Power Commission, created in section 3 of the proposed initiative, constitute a separate agency, you need to attach the Commission to an existing Executive Branch agency. If you intend that the Commission constitute a separate agency, you should amend section 2-15-104, MCA, to enumerate the Commission as an agency. Section 2-15-121, MCA, describes the effect of attaching an entity to an agency for administrative purposes only. See section 69-9-107(7), MCA, attaching the Montana Power Authority to the Department of Natural Resources and Conservation for an example of how to achieve attachment of an entity to an Executive Branch agency for administrative purposes.

Employee Rights

Section 5 of the proposed initiative provides that each person employed by a hydroelectric generation facility acquired by the state under section 4 of the proposed initiative is entitled to all rights that the person possessed as an employee before ownership of the facility was transferred to the state. The potential special legislation issues concerning section 5 are discussed in that portion of the analysis. In that portion of the analysis, I stated that it would appear that if the hydroelectric generation facilities are operated by the state, then the rights of state employees employed at hydroelectric generation facilities are likely to be different from those of all other state employees. If that is the case, an equal protection argument can be raised by the employees who hold fewer rights. For example, in *Oberg v. City of Billings*, 207 Mont. 277, 674 P.2d 494 (1983), a provision of state law providing that public law enforcement agencies were not covered by the law forbidding private and public employers from requiring a lie detector test as a condition of employment or continued employment violated the right of employees of law enforcement agencies to equal protection under Article II, section 4, of the Montana Constitution. You may wish to include at least the rational basis for the potential classification of employees in the proposed initiative.

It may be extremely expensive for the state to protect pension rights earned in private employment. In addition to pension rights, it is likely that collective bargaining agreements exist between the employees of the facility and the owners of the facility. Collective bargaining for public employees is governed by Title 39, chapter 31, MCA. Section 5 of the proposed initiative

appears to extend the rights held under a bargaining agreement with a private employer to potential state employees in perpetuity. The equal protection issues would also apply to this situation.

The state may also wish to operate acquired hydroelectric generation facilities through a contractual relationship. Any contract entered into by the state would require the state and apparently the contracting entity to comply with the terms of section 5 of the proposed initiative. In order to facilitate the development and administration of a contract, you may wish to consider the enumeration of the specific rights that are intended to be protected by section 5 of the proposed initiative.

As I noted in discussing style issues, although section 2 of the proposed initiative clearly states that the purpose of the proposed initiative is to operate acquired hydroelectric generation facilities, that authority is not specifically reflected in the powers and duties of the Montana Public Power Commission as enumerated in section 4 of the proposed initiative. That oversight should be remedied.

I have attached revised text for the initiative, but I have not made any of the specifically listed style changes, other than placing the powers and duties of the Board of Examiners in a separate section, or any of the listed legal or substantive changes discussed in this letter. I have incorporated the numerous "minor" style changes.

Please note that pursuant to section 13-27-202(1)(d), MCA, you are required to respond in writing to this office accepting, rejecting, or modifying the recommended changes before submitting a sample sheet of the petition to the Secretary of State. Your response will terminate the role of this office in this process. Further correspondence should be submitted to the Secretary of State.

Sincerely,

Gregory J. Petesch
Director of Legal Services

If you accept the suggested "minor" editorial and stylistic changes, the revised text of your proposed initiative would read as follows:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 6] may be cited as the "Montana Hydroelectric Security Act".

NEW SECTION. **Section 2. Purpose.** The purpose of [sections 1 through 6] is to acquire hydroelectric generation facilities that are in the public interest and operate them for the benefit of the people of Montana.

NEW SECTION. **Section 3. Montana public power commission -- composition -- procedures.** There is a Montana public power commission that consists of a five-member citizen board. Each board member must be elected and must be a qualified elector from the district from which the member is elected. Each member must be from a separate district of the state. The districts must correspond to the districts for members of the Montana public service commission as provided for in 69-1-104. The election of members must be implemented as provided by law.

NEW SECTION. **Section 4. Powers and duties.** (1) The Montana public power commission shall conduct an assessment of existing hydroelectric generation facilities and determine those that would be in the public interest for the state of Montana to acquire. For those facilities determined to be in the public interest to acquire, the Montana public power commission shall:

(a) purchase at fair market value any hydroelectric generation facilities with an installed capacity of greater than 5 megawatts located in the state, including dams, real and personal property, equipment, contract rights, and water rights associated with those facilities, except for those facilities that have been designated as sites requiring potential cleanup under state or federal hazardous waste or hazardous substances laws;

(b) if necessary, use the power of eminent domain to acquire at fair market value hydroelectric generation facilities, dams, real or personal property, equipment, contract rights, and associated water rights;

(c) sell electrical energy at a retail or wholesale level, provided that customers who reside in an area that was served by an investor-owned utility with its entire service territory in the state of Montana prior to January 1, 1997, and customers with an average individual metered demand of less than 1 megawatt have priority;

(d) utilize proceeds from the issuance and sale of revenue bonds by the board of examiners in order to purchase or otherwise

acquire investments in hydroelectric generation facilities and in alternative renewable energy sources and projects for energy conservation as defined in 90-4-102;

(e) reimburse any loss of revenue to any taxing unit, as defined in 15-1-101, associated with the acquisition of any hydroelectric generation facility and any associated real or personal property or distribution or transmission facilities. Reimbursement of local governments must be implemented as provided by law.

(2) The Montana public power commission has all powers necessary and convenient to carry out the duties set forth in subsection (1).

NEW SECTION. **Section 5. Rights of employees of hydroelectric generation facilities.** Each person employed by a hydroelectric generation facility acquired by the state of Montana under [section 4] is entitled to all rights that the person possessed as an employee before the ownership of the facility was transferred to the state.

NEW SECTION. **Section 6. Revenue bonds.** The board of examiners shall issue revenue bonds as necessary for the acquisition of hydroelectric generation facilities, real or personal property, and water rights set forth in [section 4] in an amount up to $500 million. The board of examiners has all powers necessary and convenient to carry out the duties set forth in this section.